



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 20, 1993

Honorable Bob Bullock  
Lieutenant Governor of Texas  
The Capitol  
Austin, Texas 78711-2068  
ATTN: Mr. Chuck Bailey

OR93-522

Dear Lieutenant Governor Bullock:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 20054.

Your office has received a request for all documents relating to the "N-Group" Facilities, N-Group Securities Inc., Mr. Patrick Graham, and Mr. Michael Graham. You have submitted for our review several documents organized as Attachment B and Attachment C, which you claim are specifically excepted from disclosure by sections 3(a)(3) and 3(a)(11). We first address section 3(a)(3) which permits a governmental body to withhold

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

You state as follows:

Some of the documents in Attachment B and all of the documents in Attachment C may be related to pending litigation. In the documents mention is made of "friendly condemnation" suits. . . .

Additionally, some of the documents in Attachment C relate to the *Alberti* litigation between the state and counties. Further, this office is aware that criminal investigation was commenced against certain groups listed in the open records request.

To secure the protection of section 3(a)(3), a governmental body must demonstrate that requested information "relates" to pending or reasonably anticipated litigation. Open Records Decision No. 551 (1990). Although the information refers to "friendly condemnation suits" you have not established that there is at present condemnation litigation or a reasonable anticipation of such litigation to which the requested information would relate. See Open Records Decision No. 542 (1990) (burden on governmental body to show why and how an exception applies to requested information).

Attachment C includes a court order in the *Alberti* case, as well as some other documents referring to that case. The court order is available to all parties in the litigation and is therefore not excepted by section 3(a)(3). Open Records Decision No. 349 (1982). Other information in attachment C concerning the *Alberti* case does not relate to the dispute in the lawsuit but to solutions to the problem of overcrowding that might be implemented in the future.

Finally, you refer to a criminal investigation commenced against some of the parties mentioned in the records. You have not shown with sufficient concreteness that criminal litigation is reasonably anticipated. See Attorney General Opinion JM-266 (1984); Open Records Decision No. 328 (1982). Moreover, the local prosecutor represents the state in criminal litigation, and it is for the prosecutor to determine that information in the possession of a state officer is related to criminal litigation for purposes of applying section 3(a)(3). Open Records Decision No. 469 (1987); Open Records Decision Nos. 141, 121 (1976). You have not shown that any of the requested information may be withheld from required disclosure pursuant to section 3(a)(3) of the Open Records Act. You may therefore not withhold any documents in Attachment B on the basis of section 3(a)(3), and you must release the documents in Attachment C in their entirety.

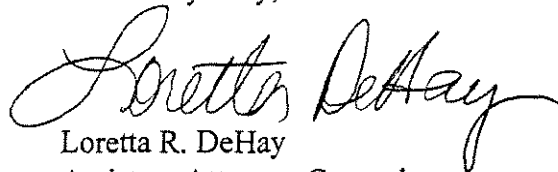
You claim that the information in Attachment B constitutes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency" under section 3(a)(11) of the act and, therefore, is excepted from public disclosure. In previous decisions of this office, we determined that section 3(a)(11) excepted those intra-agency and interagency memoranda and letters that "contained advice, opinion, or recommendation intended for use in the entity's policymaking/deliberative process." Open Records Decision No. 574 (1990) at 1-2. However, our office recently limited the scope of section 3(a)(11) in Open Records

Decision No. 615 (1993). In this decision, we held that section 3(a)(11) applies only to information that is "related to the policymaking functions of the governmental body" and does not apply to information regarding routine administrative and personnel matters. *Id.* at 5. However, section 3(a)(11) does not apply to information of a purely factual nature that is severable from the information regarding policymaking decisions. *See, e.g.,* Open Records Decision Nos. 582, 574 (1990).

The documents in Attachment B consist primarily of factual summaries of various meetings regarding the prison facilities in Texas. The documents also contain recommendations regarding these issues that are excepted from disclosure by section 3(a)(11). You may therefore withhold only those portions of the documents that contain recommendations or advice, and must release the remainder. We have marked the documents accordingly.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/SLG/jmn

Ref.: ID# 20054

Enclosures: submitted documents

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